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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 1

THE STATE OF WASHINGTON,
Plaintiff in Error,

vs.

THE STATE OF OREGON,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

REPLY ARGUMENT.

W. H. Thiele,
Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

No. 297.

ANDREW J. AIKENS,
Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,
Defendant in Error.

PLAINTIFF'S REPLY ARGUMENT.

If we could agree on the meaning of the words, "injuring," "injury," or, "injurious," and the meaning of the words "maliciously" and "malice," and the meaning of the words "his trade," in this Wisconsin statute, and the meaning of the like words in defendant's brief, much confusion of expression in the brief, if not of thought, would be avoided. *Injury, Rapalje & Lawrence's Law Dictionary. Malice, Ibid. Trade, Ibid.*

The defendant in error argues that the Wisconsin statute is merely declaratory of the common law, and so perhaps it would be if the word, "injuring," contained therein were given its common law meaning; the word, "maliciously," contained therein its common law meaning; and the words, "his trade," contained therein were taken to mean his business reputation or his trade names or trade marks, or something in which he has property. But nothing of this kind was done by the decision of the Court below to which the writ of error runs, and this is, we submit, sufficiently established by the fact that the

plaintiff in error was convicted upon admission of the truth of a plea upon which no lawyer can contend that he could have been convicted at common law.

Chapter 2, page 7, of defendant's brief, contains at once the illustration and proof of this. They argue that, "it was not necessary even at common law to make a combination formed for the purpose of *'injuring'* the business of another illegal that such purpose should be the sole and ultimate object of the combination. It was sufficient if there was a direct or immediate purpose to *'injure'* others, etc." He then cites six cases, all of which go to show that the "injury" mentioned meant not *damnum absque injuria,* but *injuria.*"

The counsel for defendant in error, moreover, do not understand the decision of the Supreme Court of Wisconsin in the same way that Court understands it. For that Court has later and in the case of *Hawarden vs. Youghiogheny & Lehigh Coal Company,* 111 Wis., 549, 550, said:

> "It is undoubtedly true that in the absence of any stat-
> "ute to the contrary, several persons may combine for the
> "purpose of increasing their business and making greater
> "gains by any legitimate means, and if as the incidental re-
> "sult of that combination others are driven out of business,
> "there is no actionable wrong. It is also true that one per-
> "son or a number of persons by agreement may refuse to sell
> "goods to another if the purpose of such refusal be simply
> "to promote his or their own welfare. From these propo-
> "sitions it is argued that no actionable wrong is shown in
> "the present case, that the main purpose of the agreement
> "charged was the lawful purpose to increase their own
> "gains by legitimate means, and hence that the plaintiff is
> "remediless notwithstanding it is also charged that one
> "purpose of the agreement was to drive the plaintiff out of
> "business. It may at once be admitted that this line of
> "reasoning has been adopted by some of the courts which
> "have been called upon to deal with the subject. It has
> "not, however, been adopted by this Court. In fact in a
> "very recent case of *State ex rel. Durner vs. Huegin,* 110
> "Wis., 189, it was in effect repudiated."

Defendant finds (page 6) that Lord Denman's attempted definition, which has been much criticised as being too broad and making it a criminal conspiracy for two persons to agree to walk in a park without leave (*Wright Criminal Conspiracy*, 14, p. 51; 1 *Eddy on Com*b., Sec. 341, et seq.), is all to narrow for them, and illustrate by referring (page 7), to a combination (a) to do an act highly immoral; or (b) against recognized rules of public policy. But (a) does not constitute a criminal conspiracy unless the "highly immoral" act is also unlawful, e. g. a combination to plagiarize is not criminal. While in (b) it is impossible that any act could be "against recognized rules of public policy," and at the same time not be unlawful.

Grouping cognate subjects we must now pass over to the collection of conspiracy statutes found on pages 13 and 14 of defendant's brief, and concerning these we submit each and every one of them is no doubt a valid enactment when so construed as not to deprive any person of liberty or property without due process of law, nor deny to any person equal protection of the laws. In short, as we have said in our original brief, the difficulty is not so much with this Wisconsin statute, although it is an extraordinary statute in the generality of its terms, as it is with the construction given to this statute by the Supreme Court of Wisconsin.

See *Wright on Criminal Conspiracies*, Section 17, "Conclusions," Subdivision 3, entitled, "Agreements for Acts which in the absence of agreements would not be crimes or offenses," also same work, Section 14; also 2 *Eddy on Combinations*, Sections 901, 902, 903, 904, and illustrative statute commented on in Section 905 et seq. It is the decision of the Supreme Court of Wisconsin *to which the writ of error runs* which deprives the plaintiff in error of liberty and property and denies to him the equal protection of the laws. This would be true of the decision if it were based on no statute at all, based on a statute improperly construed, or based on a statute properly construed; the only

difference would be that in the latter case the statute must go down with the reversal of the erroneous decision properly based upon it.

If the concession, "for the purpose of argument," found on page 5 of the brief of counsel for the State, viz: that the state court was wrong in not giving proper effect to the averments of the pleas, is a concession which they ought to make absolutely, or discloses a condition that is apparent to this Court, then the constitutional rights of the plaintiff in error have been as much infringed by such an erroneous decision as if that decision were expressly dictated by statute. Because it is the rule applied by the Court below without regard to the authority, body or Court from which such rule first emanated which is the subject of review in this Court. If the Court below by erroneous construction of the plaintiff's plea punished him for the exercise of a right essential to liberty or the enjoyment of property it thereby laid down an unconstitutional rule. In these sociological-legal questions every erroneous decision in negation of a claim that a person is being deprived of liberty or property without due process of law is necessarily an unconstitutional decision. There is in such instances no middle ground. To be incorrect is to be unconstitutional. And it is perhaps the greatest function of this great Court to pass upon such questions of lasting human and world-wide interest.

MALICE.

The word "maliciously" seems to be used in the brief of counsel for the State at page 5 in the sense of a conscious or intentional violation of the legal rights of another or in the sense of such violation of some rule of public law because he instances as advantageous acts of competition arson and murder. At page 11 he seems to use the word "malicious" in the sense of having personal ill-will or hatred where he says, "The right to earn a living to carry on his business free from malicious interference, free from the unequal power of combinations formed to harass, oppress and destroy is one of the recognized rights, etc." But whatever meaning counsel for the State attaches to this word the meaning given to it by the Supreme Court of Wisconsin is that of personal ill-will or hatred. Because the decision of that Court can only be explained by giving the word "maliciously" the latter meaning or else by considering that the Court ruled that a person has a legal right to retain and hold his trade patronage as against a competitor. Is not this a correct statement of the necessary result of the Wisconsin decisions? *It must establish either one or the other (or both?), of the foregoing propositions, not in words but as a necessary consequence.*

A rule promulgated by a state legislature or Court plainly to the effect that no one should engage in trade competition who at the time felt hatred or ill-will toward his competitor would be subversive of liberty and the rights of property beyond doubt. Now the only alternative is that the rule promulgated by the Supreme Court of Wisconsin is in substance and effect that "maliciously" in this decision has its common law meaning and connotes "a conscious violation of the law to the prejudice of another." But as soon as we give it this meaning we have given the person who has trade patronage a lawful right to re-

tain it as against him who has it not and so brought ourselves within the constitutional interdict against denying persons the equal protection of the laws. This Court has said in *Adler vs. Fenton,* 24 Howard, 407, that an act legal in itself and violating no legal right cannot be made actionable on account of the motive which superinduced it.

Again, in *Connolly vs. Union Sewer Pipe Co.,* 184 U. S., 540, this Court has said, quoting with approval from *Kiff vs. Youmans,* 86 N. Y., 329: "The exercise of the legal right cannot be affected by the motive which controls it."

But without encumbering this brief with numerous citations on this point we desire to refer the Court to the article by L. C. Krauthoff in Volume 21, *Reports of American Bar Association* for 1898, p. 335 to 386, which is a most thorough review of the cases on this subject of malice as an ingredient of a civil cause of action. Illustration: Suppose a state statute made it a misdemeanor to begin suit maliciously on a debt, to maliciously vote against any candidate, to maliciously carry on any lawful trade or profession, to maliciously travel by public conveyance, would such an act be valid? Observe the distinction between the rights of persons requiring affirmative action for their enjoyment, such as the right to vote, the right to engage in trade and competition, the right to travel, etc., and rights of persons not requiring affirmative action in order to enjoy them, as to hold property, to be secure in one's person, etc.

The former rights are effectually denied by a legal rule that the motives governing their exercise can be inquired into in a criminal prosecution. The denial of these rights is a denial of liberty. This brings us to the question suggested in *Rideout vs. Knox,* 2 L. R. A., 81; 148 Mass., 368, where it was said by Holmes, J.:

> "We can concede further that to a large extent the "power to use one's property malevolently in any way "which would be lawful for other ends is an incident of

"property which cannot be taken away even by legislation. "It may be assumed that under our constitution the legis- "lature would not have power to prohibit putting up or "maintaining stores or houses with malicious intent and "thus make a large part of the property of the common- "wealth dependent upon what a jury might find to have "been the past or to be the present motives of the owners."

III.

DENIES THE EQUAL PROTECTION OF THE LAW.

The state law as declared by the Supreme Court of Wisconsin not only makes all competition criminal where the jury may find an improper motive behind it (because all competition is necessarily co-operative and necessarily unkind, and a conspiracy in this sense could be predicated of every imaginable case of competition), but it also denies to persons in that state the equal protection of the laws. Because that law as declared by the Supreme Court of Wisconsin says to A and B who have little trade patronage and associate and agree to acquire more, and to C and D who have no trade patronage and associate and agree to acquire such patronage: "You shall not act together for the purpose of resisting by group or co-operative competition a raise of prices made by E and F who have and are enjoying trade patronage because winning away the customers of E and F is an '*injury*' to E and F." At the same time it says to E and F: "You may combine and act together to keep and hold the trade patronage which you have. Not only this, but you may invoke the criminal laws against A and B or C and D to protect you in your raise of prices and in holding the patronage you have." Consequently the equal protection of the laws is denied. Those who have not trade patronage and would strive for it or those who have little trade patronage and would seek for more cannot combine, associate or concert together to acquire it. While those who are enjoying large or sufficient

trade patronage may combine, associate and concert together to keep it. This is an inadmissible basis of classification. If there were an absolute right of property in trade patronage, or if the business association in the field and enjoying patronage had a different right to it in the law from the newcomer, this classification into those who have and are not within the statute, and those who have not and are within the statute might be valid. But there is no property in the sense of exclusive right in any one to the enjoyment of trade patronage. *Consequently there is no permissible legal basis of classification for the purpose of making guilty those who act together to win away a portion of it and not guilty those who act together to retain it.* Under this rule of law against which we are contending *the same acts which will constitute a criminal offense by the one class who have not patronage will not constitute a criminal offense by the other class who already have trade patronage.* This is no fanciful condition of things, but the direct and immediate result of the Wisconsin decision is to establish this rule. For is not this the real tenor and effect of their decision overruling the plea of the defendant? The right of a person in the law to trade patronage is something like his right to natural gas, subterranean waters, petroleum or animals feræ naturæ, that is, it belongs to him who captures it and only while he holds it. But every other person has the right (doing no trespass) to capture or hold it. A sort of property is acquired *propter imptentiam.* But it lasts only until the animals escape. Suppose two men owned adjoining farms and one tapped a flow of natural gas and was using it and the other thereafter tapped the same reservoir on his farm and began using it. Could the legislature or the courts of a state under this 14th amendment say that the second man should be guilty of a misdemeanor because by the exercise of his legal right to drill a well on his own land he injured the first in the sense of diminishing the quantity or value of the gas which the first had been theretofore

enjoying? Would such an act of the legislature, or such a decision of a court, deny to these two men the equal protection of the laws? If it would in that case, it would as surely do so in the case at bar. A situation somewhat analogous to that in the case at bar on this point developed in the case of *Cote vs. Murphy*, 159 Pa. St., 420; 28 Atl. Rep., 190. There the Court said of the combination:

> "It was not made to lower the price of wages as regu-
> "lated by the supply and demand, but to resist the artificial
> "price made by a combination which by statute was not un-
> "lawful; (2) The methods adopted to further the objects of
> "the combination were not unlawful."

The Court touches upon, but does not directly decide this question. It says:

> "If there be nothing criminal in a combination to artifi-
> "cially raise wages, there can be nothing criminal in an em-
> "ployer's combination to resist the advance or to artificially
> "depress them."

Why not? Manifestly because to make one act criminal and the other innocent would be to deny to the parties the equal protection of the laws. It is not what the courts say argumentatively that constitutes the rule of law established by judicial decision, but what they decide. The decision complained of here lays down the rule that two or more cannot co-operate in competition against another business group to "injure" the latter group by winning away their customers. This establishes that the latter have a legal right to co-operate to retain their patrons or customers because their retention of such customers does not take them away from those who had them not, therefore does not "injure," while the other class, viz: those who have

not trade patronage or customers, will be criminally liable for the same kind of combination and the same acts directed to acquiring new customers.

Respectfully,

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